FAMILY LAW

Cases and Materials

Volume I

Brenda Cossman, Carol Rogerson and Martha Shaffer
Faculty of Law
University of Toronto

2002-2003

Prepared with the assistance of Andrea Sanche

* * *

These materials are distributed solely for classroom use by students in the Faculty of Law, University of Toronto

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> it from all other relationships can only be met by two persons of opposite sex." (The italics are mine.)

Then there is the very useful decision of Jeune P. in *Moss v. Moss*, [1897] P. 263 at 268:

> "The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnization, so far as the law deems it essential. There must not be incapacity of the parties to marry either as respects age *or physical capability* or as respects, but I believe in no others ... renders the marriage void or voidable." (The italics are mine.)

As I perceive it then, the law of England, with which in this respect I understand the law of Canada conforms, stipulates that the capacity for natural heterosexual intercourse is an essential element and, if there exists an incapacity with respect to the physical capability to engage in that essential element, then the marriage is void or voidable. A void marriage is, of course, no marriage at all, ab initio, while a voidable marriage is one which is valid and subsisting until annulled.

The marriage in this instance was not void: there was voluntary consent; there was compliance with the legal requirements; there was no incapacity either as respects age or relationship by blood or marriage; there was no *apparent* incapacity as respects physical capability.

If my understanding of the transsexual personality is correct, although the physical capacity for normal heterosexual intercourse may exist, there also exist psychological factors, inherent in the personality, which preclude or otherwise inhibit the actual exercise of such physical capacity. These psychological factors may be initially patent, in which case there is simply no capacity to exercise the function, or they may be latent or suppressed, in which case the capacity to exercise the function does exist and may indeed by exercised, but the exercise thereof simply makes patent what was earlier latent and the act of heterosexual intercourse thereby comes abhorrent to the point where it becomes, in effect, a continuing incapacity. The incapacitating condition was present in the marriage from its outset; it was merely triggered into transition from the state of latent potentiality into the state of patent actuality by the circumstance of the intimacy arising out of the married relationship, which, being heterosexual in nature, was incompatible with the inherent nature of the respondent.

I find, therefore, that there existed at the outset of this marriage a latent physical incapacity for natural heterosexual intercourse, which incapacity became patent only subsequent to the solemnization of the marriage, of such consequence as would render the said marriage voidable and by reason thereof I now declare the said marriage be, and the same is, annulled.

B. v. A.

(1990), 29 R.F.L. (3d) 258 (Ont. S. C.)

MASTER CORK:-The parties each bring motions before me, but these reasons are principally addressed to the motion by the applicant B. for support from the respondent A., under somewhat unique circumstances.

The issue before me, briefly, is whether the applicant B., is a "man" within the definition of "spouse" in s. 29 of the *Family Law Act, 1986*, so as to qualify B. as claimant of support from A.

Originally, both A. and B. were born female. A. then developing normally, eventually marrying and bearing children who are living today. There is no issue before me raised by any party that A. is not a woman, and I am proceeding on this understanding.

While then I do agree that there can be a change in sex so as to create the legal basis of "cohabit" under s. 29 of the *Family Law Act,* I believe that such must be at least irrevocable, and independent of exterior continuing circumstances after the surgery is completed. Neither of these circumstances are available to B. in this present case.

It is also my opinion that the certificates of the doctors filed under the *Vital Statistics Act* are patently erroneous in their conclusion.

It is therefore my conclusion that the present applicant B. is not under the definition of "man" under s. 29 of Pt. 3 of the *Family Law Act* and therefore does not have the right to apply for interim support from the respondent.

Of course, this is in no way intended to impede any trust arguments that may be raised by B. against A. for the division of the assets that they amassed together during their time under the same roof, but certainly I am persuaded that B. cannot now qualify as a quasi "spouse" for the present purposes of a support claim.

Motion dismissed.

Note: *C. (L.) v. C. (C).* (1992), 10 O.R. (3d) 254 (Ont. Gen. Div.)

In *C.(L.) v. C.(C.)* a woman applied to have her marriage declared a nullity. She had married the respondent, who at the time of marriage, had initiated a female to male sex change, having undergone hormonal treatment, a hysterectomy and surgery to remove her breasts. The respondent had told the applicant that she had intended to have surgery to construct male genitalia, but then never did so. Following *B. v. A.* the Court held: "The law as it currently exists does not provide for marriages between members of the same sex. In this case, when the parties married they were both female. As a result the "marriage" was a nullity and is void ab initio."

Note: Same-Sex Marriage and The Legal Recognition of Same Sex Relationships

In Canada, as in many other jurisdictions, some form of legal recognition, other than marriage, has now been extended to same-sex relationships.

Following the Supreme Court of Canada's decision in *M. v. H.*, the Ontario government introduced Bill 5, *An Act to amend certain statutes because of the Supreme Court of Canada Decision in M. v. H.*, (assented to 25 October 1999, S.O. 1999, c.6) extending to same-sex couples the same legal rights and responsibilities as cohabiting opposite-sex couples in all matters covered by Ontario law. In 2000, the federal government enacted the *Modernization of Benefits and Obligations Act* (*MBOA*) which amended 68 federal statutes in a similar fashion. However, neither Bill 5 nor the *MBOA* changed the definition of spouse or marriage. Rather, same sex couples have been added as "partners". The *MBOA* also contained a definition of marriage in section 1.1, which provides "For greater certainty, the amendments made by this Act do not affect the meaning of the word `marriage`, that is, the lawful union of one man and one woman to the exclusion of all others."

In the aftermath of *M. v. H.* virtually all of the provinces have passed laws extending to same sex couples the same rights and responsibilities as opposite sex cohabiting couples. In some provinces, like Alberta, the legal recognition is limited. In most other provinces, the legal recognition is more extensive. For example, in 1999, Quebec amended its laws to grant same sex couples the same benefits and obligations already available to opposite sex couples. In 2001, Manitoba passed the *Act to Comply with the Supreme Court of Canada Decision in M. v. H.*,

> The essential properties of marriage are unity and indissolubility; in Christian marriages they acquire a distinctive firmness by reason of the sacrament. (Canon 1056)

In legal terms, this essential characteristic of marriage is the source of specific conjugal duties, including the obligation of fidelity between the spouses. Finally, the exclusivity of the conjugal union is the basis of the principle of monogamy.

The monogamous marriage is derived directly from the oldest Roman law, as reinforced by canonical theory. This Romano-Christian concept is the historical substratum of the matrimonial systems of countries with a Christian tradition. As Jean Carbonnier writes, [TRANSLATION] "the institution of monogamous marriage is a capstone of European legal civilization." This tradition is, therefore, the source of Canadian matrimonial law in the common law provinces and in Québec, where the legal system is based on civil law.

Monogamous marriage is not simply the result of a legal tradition. It is also a fundamental aspect of society and civilization. Furthermore, the principle of monogamy is not an exclusively Romano-Christian concept. Monogamy and its corollary, the prohibition of polygamy, have existed in other civilizations. According to Tacitus, the Germanic tribes in antiquity generally accepted only monogamous marriage. Seeking to establish the antiquity of the institution, Blackstone explains that in ancient Scandinavian-law, polygamy was a crime punishable by death. In the Age of Enlightenment, the uniformity of monogamous practice in Europe was explained by the climate of the Nordic countries and demographic conditions in Eastern nations....

Note: Bigamous and Polygamous Relationships

In Canada, there are *Criminal Code* provisions prohibiting both bigamy and polygamy (see statutory materials). With respect to family laws, a marriage to a person already married is void *ab initio* regardless of whether there is good faith that the first marriage had been terminated by death or was void. The relevant time of assessing the validity of the second marriage is at the time of the marriage ceremony. A person's spouse is presumed to be dead following seven years without hearing from the spouse. However, if the spouse who was presumed dead returns at any time, the second marriage is void. (Most people in this situation would now obtain a no-fault divorce after a one-year separation rather than relying upon the presumption of death.)

Polygamous relationships are recognized by Ontario family law in one respect. By nature of s. 1(2), a marriage that is, or has at any time been, polygamous and was validly contracted overseas is deemed to be a marriage for the purposes of proceedings under the *Family Law Act* – i.e. proceedings for division of property, occupation of the matrimonial home, support, and dependents' claim for damages against third parties in case of injury or death of a family member.

Monogamy is not an essential feature of marriage in all cultures. Polygamy has traditionally been practiced or accepted in some religious and cultural groups from Africa, Asia, and the Middle East, as well as fundamentalist mormons. The law of Islam sanctions polygamy in certain circumstances. The concept of marriage which is embodied in Canadian law and that of most other western countries owes its origins to Christian beliefs about marriage as a monogamous and life-long commitment. Some commentators suggest that the values which originally supported our concept of marriage may no longer be widely accepted.

In 1992, the Australian Law Reform Commission released *Multiculturalism and the Law* [ALRC Report No. 57, (1992) Australian Government Publishing Service, Canberra] a report commissioned in light of the Australian government's official policy on multiculturalism, the National Agenda for a Multicultural Australia (1989). One of the policy's objectives was "to promote equality before the law by systematically examining the implicit cultural assumptions of

(iv) **Motive**. Most people who go through a marriage ceremony do so with a view to living together in a family environment. The validity of a marriage has sometimes been questioned where the parties many for reasons other than this socially accepted one. The most common type of "improper purpose" marriage is an "immigration marriage", a marriage entered into solely for the purpose of enabling one of the parties to enter or remain in a country in which he or she otherwise could not. Courts have generally been reluctant to inquire into a person's intention in entering into marriage. Whether a marriage is "real" or not is too subjective a matter to be a test of general application. In *Iantsis v. Papatheodorou*, *supra*, the Ontario Court of Appeal held that where the parties understood they were going through a marriage ceremony and understood who they were marrying, the motive for undergoing the ceremony is irrelevant. Case authorities have established that "immigration marriages" are not invalid for that reason alone. (See, for example, *Singla v. Singla* (1985), 46 R.F.L. (2d) 235 (N.S.T.D.).)

The materials that follow examine some of these requirements in more detail.

i) Capacity to Understand

A valid marriage requires that the parties have the capacity to understand the basic nature of marriage. In *Durham v. Durham* (1885), 10 P.D. 80 at 81-2, the Court held that "it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others."

This requirement imposes limitations on the ability of mentally disabled persons to marry. Hahlo writes:

> Insanity of either party at the time of the marriage is a ground of annulment. A person is insane, within the meaning of this rule is he is, owing to mental disease or disorder, incapable of understanding, free from the influence of morbid delusions, the nature of the marriage contract and the duties and responsibilities which it entails. The ground of nullity is not the mental disease or disorder as such, but the absence of a mind legally capable of consenting.

(Hahlo, *Nullity of Marriage in Canada*, 1979, at 25.)

Sections 7 and 35(2) of the *Marriage Act*, R.S.O. 1980 imposes restrictions of formal validity on the ability of mentally disabled persons to marry. Are these restrictions on the ability of mentally disabled persons justifiable?

David Thompson, "A Consideration of the Mental Capacity Provisions of the Marriage Act in View of the Charter of Rights and Freedoms and *Webb v. Webb*"

(1986), 9 Can. Com. L.J. 101, at 101-109

The *Canadian Charter of Rights and Freedoms* has ushered in a new era in the protection of individual rights, particularly since this protection is no longer in a statute, but is incorporated in the Canadian Constitution. A purpose of referring to particular groups in Section 15 of the *Charter* is to legally, and hopefully socially, incorporate the members of those groups into the mainstream of Canadian society. One of the groups specifically mentioned in Section 15 is the mentally handicapped.

During the past twenty-five years there has been a conscious effort to involve the mentally disabled in the mainstream of society, recognizing their individual needs of companionship and belonging which would include participation in the marriage institution. The

> brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case.

In *Cooper v. Crane*, [1891] P. 369, Collins J. stated at 376 with regard to a petition for a declaration of nullity on the basis of duress:

> In order to so hold that the ceremony so performed was not binding, I think I should have to infer as a fact one of two things – either that she was so perturbed by terror that her mind was unhinged, and she did not understand what she was doing – and this I think is what is meant by the words 'not known what she is about' in the passage from Hishop, cited in the argument, and which is based on Fulwood's Case (1637) – or that though she understood what she was doing her powers of volition were so paralyzed that, by her words and acts, she merely gave expression to the will of the respondent and not her own.

Scott v. Sebright, and *Cooper v. Crane* cited in *Thompson v. Thompson* (1971), 4 R.F.L. 376 (Sask. Q.B.).

In *Buckland v. Buckland*, [1967] 2 All E.R. 300, Scarman J. held that the coerced party had to establish that fear of a sufficient degree to vitiate consent was present; that the fear was reasonably entertained; and that the fear arose from external circumstances for which the petitioner was not responsible.

S. (A.) v. S.(A.)

(1988), 15 R.F.L. (3d) 443 (Ont. U.F.C.)

MENDES DA COSTA U.F.C.J.: – In this case, the applicant is A.S. and the respondent is A.S. The applicant seeks the annulment of her marriage to the respondent or, in the alternative, a divorce. The respondent did not file an answer or appear at the hearing. The applicant's testimony was the only evidence adduced to the court.

1. *The facts*

The applicant was born on 9th April 1969. On 28th February 1986 she went through a form of marriage with the respondent, who had recently arrived in Canada. The marriage was celebrated at the city hall, Hamilton, and the certificate of marriage was filed as Ex. 2. At this date, the applicant was 16 years of age. Her parents had separated, and she was living with her mother and her stepfather. The consent of the mother to the marriage was contained in a certificate of consent filed as Ex. 3.

Paragraph 8 of the application contains the grounds for relief and comprises subparas. (a) to (e). Subparagraphs (b), (c) and (d) read as follows:

> (b) The applicant married the respondent after considerable pressure being applied against her by her natural mother and step-father. The applicant did not know the respondent but was told that he would be ordered to leave Canada unless he married a Canadian citizen.
>
> (c) The applicant's mother and step-father were to receive $500,000 for arranging to have the applicant marry the respondent. This was the motive for their participation. The applicant was particularly sensitive to the pressure because there was a history of sexual abuse by the step-father toward her. In fact, the applicant was removed from the home for a period of three years by the Children's Aid Society in Calgary Alberta because of this abuse.
>
> (d) The applicant never lived with the respondent and she has never had sexual intercourse with him.

In a marriage ceremony the parties bestow the marriage status upon each other; the official merely directs the rite and registers it. No special uniting virtue emanates from the celebrant; he is a chairman-secretary of the meeting, without a vote, as it were; and when the petitioner declared that she was taking the respondent as a husband, and vice versa, she said nothing meaningful because her concept of husband was in fact devoid of any substance. This is not a case of mental reservation but one of mental vacuum.

Our culture has long since outgrown the magic age when mere words abstracted from any meaning, had a potency of their own.

The words uttered by the parties at their bogus marriage were mere hocus-pocus without any sense and therefore without any legal effect.

An eminent American judge has qualified such a charade as a farce; I find it a mischievous one, for, as in this instance, it degrades a fundamental social institution to the level of a fraudulent trickery to hoodwink the immigration authorities.

The institutional debasement is further compounded by the culprits' invitation of the courts to abet their deceitful scheme by performing its last act: to wit, the grant of an obliging divorce.

Quaere whether this type of conduct does amount to a public mischief.

Unfortunately this sham marriage is entered in the official records and, to erase it to be able to marry, the parties will have to resort to annulment proceedings.

Petition dismissed.

Note: *Singla v. Singla* (1985), 46 R.F.L. (2d) 235 (N.S.S.C. T.D)

In this case, Nunn, J. considered the validity of a marriage which was arranged according to Hindu custom by the brothers of the plaintiff and defendant; the parties were married according to Hindu custom in India and the marriage was property registered in India. The plaintiff alleged, however, that the marriage was fraudulently obtained by the defendant to facilitate his immigration to Canada. The plaintiff and defendant had never met until the date of the ceremony, they spent one week together in India after the ceremony (without marital relations), the defendant did not write much to the plaintiff after she returned to Canada while he remained in India for eight months. On his arrival in Canada, they lived together for 12 days, and had marital relations once at the insistence of the plaintiff.

Nunn, J. reviewed the authorities (including *Swift v. Kelly* decided in 1835), and concluded that the law of Nova Scotia was as stated by Schroeder, J.A. in *Iantsis*; since there was no mistake as to the nature of the ceremony or the identity of the parties, the marriage was valid. According to the judge,

> "to hold otherwise would be to open the floodgates for the dissolution of many marriages on the basis that one of the parties was deceived as to the intent of the other.... I realize that in an individual case this policy may cause particular hardship; however, it is necessary that the broad policy be accepted as the law of this province."

In light of this statement, consider the comments in the case annotation in the Reports of Family Law:

> There seems little doubt, on the authorities cited, that *Singla v. Singla* represents the state of the law today ... . The question which should be asked is whether the accepted authorities are "correct". A rule of law correct at one time in history may not be correct at another, not because it was never correct but because the society and circumstances which gave rise to the need for the law and justified its existence have now ceased to exist. To continue to apply a rule of law which no longer represents reasonably-held community expectations is to render "Law" a simple exercise in power rather than an instrument of social regulation. The view of the law so clearly set out by Nunn J. at p. 239 is identical to that set out by the British courts in 1835.

In our sample of divorce cases, the length of time to obtain the divorce was 11 weeks longer on average, when couples chose one or a combination of fault grounds (adultery and mental and physical cruelty). This is attributed to the greater likelihood that corollary issues were, at some point, in dispute in the group using these grounds than was the case for those using the one-year separation ground. However, overall, the average number of weeks between filing and disposition has, in the four research sites, been reduced from 35 weeks to 22 weeks between Phase I and II, largely as a result of a substantial reduction in average time taken in Montreal and Ottawa. At the same time, there was no final judgement more than a year after filing in just under one-fifth of the files reviewed.

The new legislation made it possible for the provinces and territories to introduce rules permitting divorce without a court hearing. At the time of writing, all provinces except Newfoundland have elected to make this change with the result that from 37 to 98 percent of divorces in these jurisdictions were finalized without a formal court hearing. Due possibly to the additional paperwork involved, our sample of clients, using this option, report higher or about the same legal fees as those who finalized their divorce in an uncontested hearing depending on the research site. However, legal fees for all types of cases had increased between Phase I and II more than can be accounted for by inflation.

The *Divorce Act* also makes it possible for divorcing parties to make a joint application or petition. Central Divorce Registry data indicate that overall, 4.2 percent of petitions are joint petitions but the range is from virtually nil to just under 11 percent. In our sample it was found that those who made a joint application paid legal fees which were only 38 percent of average fees, were able to finalise their divorce in 14 rather than 22 weeks, were nearly twice as likely to have chosen a joint legal custody arrangement and had agreed to somewhat more generous support quanta than those divorces initiated by a sole application. The main impact of this provision, then, is not to "cause" these outcomes but to provide divorcing couples with a legal means of signifying that they are divorcing amicably and responsibly....

A general conclusion reached in the evaluation is that, compared to the picture presented by the Law Reform Commission in the 1970's, the divorce process has gradually become less adversarial. The various data sources of this evaluation suggest that changing approaches to family law matters were under way prior to the legislation coming into force. Thus, provisions intended to reduce the adversarial nature of divorce were essentially catching up with these changing attitudes and practices many of which are already incorporated into provincial and territorial legislation and procedures.

Note: Divorce Reform in England

In 1996 Britain passed new divorce legislation, originally intended to take effect in 1999, which would replace the 1969 divorce legislation under which the sole ground for divorce was marriage breakdown, which could be established by evidence of adultery, cruelty or separation for two years (or five years in case of petitioner desertion). The new divorce legislation—*the Family Law Act 1996*—replaces a grounds-based approach to divorce with a procedural approach. The concept of separation is essentially replaced by that of a waiting period.

The first step in the new divorce procedure will be attendance at an information meeting which will cover such issues as marriage counselling and other marriage support services; the importance to be attached to the welfare, wishes and feelings of the children; how the parties may acquire a better understanding of the ways children can be helped to cope with the breakdown of the marriage; the nature of the financial questions that may arise on divorce or separation and services which are available to help the parties; protection against violence and how to obtain support and assistance; mediation; the availability to each of the parties of independent legal advice and representation; advice about obtaining legal aid; and the divorce and separation

Note: *Valenti v. Valenti*

In *Valenti v. Valenti* (1996), 21 R.F.L. (4th) 246 (Ont. Gen. Div.) damages were awarded to both a wife and child because of a spousal assault. The parties had a sixteen year marriage with recurring periods of separation. The husband had a serious alcohol problem and was frequently violent, including threatening the wife with guns and choking her. He worked only sporadically through the relationship and the wife provided the main financial support. The final separation occurred in December 1991 after the husband assaulted the wife in an episode that lasted several hours. The episode was witnessed by the younger son (then 10). After the wife and children left, the husband went into the son's room and destroyed most of his furniture. The husband pleaded guilty to an assault charge and received a five month jail term. The wife claimed to have serious emotional problems due to the husband's behaviour during the marriage. She attended psychotherapy and victim support groups and suffered mild to moderate symptoms of post-traumatic stress disorder.

In proceedings under the *Family Law Act*, the husband claimed an equalization (i.e., equal division) of family property, while the wife requested an unequal division in her favour and child support. In a second action, which was joined with the first, the wife and son claimed damages as a result of the assault. While the court refused to take the husband's conduct during the marriage into account in the division of property, holding that the circumstances were not "unconscionable" so as to require a departure from equal division, the wife was awarded $15,000 in damages for assault and forcible confinement ($10,000 for pain and suffering, $2,500 in aggravated damages, and $2,500 as punitive damages), which she was allowed to set off against the $19,000 she owed the husband by way of property division.

The son was also awarded $3,500 damages ($2,500 for pain and suffering and $1,000 to replace the items the father had destroyed in his rage.) The damages to the son were based on evidence of the serious psychological effects the assault had had on him, when seen against the background of verbal, physical and emotional abuse which the son had previously suffered. The son's schooling had been interrupted and he had serious behavioural problems that had resulted in encounters with the law.

(c) Grounds for Divorce

(i) Living Separate and Apart

Rushton v. Rushton*

(1968), 66 W.W.R. 764, 2 D.L.R. (3d) 25 (B.C.S.C.)

MCINTYRE J.:—The parties were married in 1936. By 1960 they had come upon difficulties and had begun to live separate lives, although they continued to reside in the same suite in an apartment building. In February 1965, and probably from an earlier date, sexual intercourse ceased entirely. The petitioner lived in one room of the suite, the respondent in another, there was almost no contact between them. The with performed no domestic services for the husband. She shopped and cooked only for herself. He bought his own food, did his own cooking, his own laundry and received no services from his witty He paid her a sum monthly for maintenance.

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* Case as edited taken from B. Hovius, *Family Law: Cases, Notes and Materials*. 2d ed. (Toronto: Carswell, 1987).

> higher level of understanding. The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy. It has been said that the highest level of capacity is that required to make a will: Park, supra, at p. 1426. (I note that Mr. Birnbaum felt that, in August 1994, he would have taken instructions for a will but for Dr. Hogan's concern about her ability to instruct counsel.) While Mrs. Calvert may have lacked the ability to instruct counsel, that did not mean that she could not make the basic personal decision to separate and divorce.

The Court concluded that Mrs. Calvert did have the capacity to live separate and apart.

Note: Relevance of Date of Separation for Property Division

Determining the date of separation is also of importance under Ontario's *Family Law Act*, under which the valuation date for the purposes of calculating equalization payments between the spouses is usually "the date the spouses separate and there is no reasonable prospect that they will resume cohabitation" (s.4(1), definition of "valuation date"). The relevance of the date of separation to the division of matrimonial property will be discussed in detail in the materials on the *Family Law Act,* below (Vol. II).

Note: Alternatives to Separation as a "No-Fault" Ground for Divorce

Given the difficulties, in some cases, of establishing when the parties separated or whether they were living separate and apart under the same roof, would it be preferable to replace the requirement of separation as a ground for divorce with that of a waiting period (six months? one year?) following the filing by one or both of the spouses of a declaration of an intention to seek dissolution of the marriage? This approach was recommended by the Canadian Law Reform Commission in 1976 and is basically the approach that was taken by Britain in its 1996 divorce reform (discussed above in the introductory materials on no-fault divorce).

(ii) Adultery

Adultery has been retained as a basis for establishing marriage breakdown. According to s.8(2)(b) of the *Divorce Act*, only the innocent party, that is, the person against whom the adultery has been committed, may bring the petition for divorce. Adultery is not defined in the *Divorce Act*, but has been defined by the courts as voluntary sexual intercourse between a married person and another person of the opposite sex other than his or her spouse. Other acts of a sexual nature do not constitute adultery. Proof of adultery is on the balance of probabilities. Admissions by the defendant or third party represent a frequent method of proof in an uncontested case. However, because of the nature of the allegations it is sometimes necessary to rely on circumstantial evidence tending to show that the parties were on such terms of sexual involvement that they would take advantage of any suitable opportunity.

William Schmidt, "Wisconsin woman to stand trial on rarely used adultery charge"
The Globe and Mail, May 1, 1990

CHICAGO—A 28-year-old woman will be arraigned next month in northern Wisconsin, where she is to stand trial on one of the rarest of criminal charges: adultery.

Again, an adverse inference may be raised. I realize, of course, that psychic impotence may not be universal but may be directed or limited to a particular person, but the absence of evidence is not helpful in this case.

On a balance of probabilities, therefore, I find that the allegation of adultery has been established. There will be a *decree nisi* granted to the husband on his counter-petition.

Note: *d'Entremont v. d'Entremont* (1992), 44 R.F.L. (3) 224 (N.S.C.A.)

In *d'Entremont* the wife appealed the dismissal of her petition for divorce on the grounds of her husband's adultery. The husband had acknowledged by affidavit that he had committed adultery commencing at the time of separation, stating that the adultery had not been condoned by the wife. The trial judge had refused to grant the divorce for the reason that the adultery had not been proved. The Nova Scotia Court of Appeal allowed the appeal, and granted the divorce. In these uncontested proceedings, where there was evidence before the Court proving the uncondoned adultery of the respondent, the requirements of section 8 of the *Divorce Act* had been met. No additional formalities were required

(iii) Cruelty

Knoll v. Knoll*

[1970] 2 O.R. 169, 1 R.F.L. 141 (C.A.)

[The wife appealed a judgment dismissing a petition based on s. 3(d) and s. 4(1)(b) of the 1968 *Divorce Act*. Evidence at trial indicated that the husband drank heavily and that the wife left the matrimonial home because of the husband's abusive conduct towards her after he drank. Although there were no allegations of great physical violence, corroborated evidence indicated that the husband did assault his wife on a number of occasions and once shoved her forcibly against a chimney causing her physical injury. When the husband was inebriated, he treated the wife very coarsely, rudely, and disrespectfully, applying vile epithets to her. The wife's doctor testified at trial that the marital situation had ruined the wife's nerves. She had high blood pressure, was completely run-down, and had lost 19 lbs. before she left the home. Medication had been prescribed.

The Court's reasons regarding s. 3(d) are reproduced below. The wording of s. 3(d) was virtually identical to that in s. 8(2)(b)(ii) of the *Divorce Act, 1985*.]

The judgment of the Court was delivered by

SCHROEDER J.A.:—...It is evident that the learned Judge held and gave effect to the view that cruelty within the meaning of s. 3(d) of the *Divorce Act* was legal cruelty as defined in *Russell v. Russell*, [1897] A.C. 395 at 467, and in Ontario in *Bagshaw v. Bagshaw* (1920), 48 O.L.R. 52, 52 D.L.R. 634, and in many English and Canadian cases in which the principle there enunciated has been consistently followed and applied, a rule which required proof of conduct of such a character as to cause danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger. He must have concluded that the concept of cruelty as laid down in those cases was unaltered by the provisions of s. 3 of the *Divorce Act*....

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* Case as edited taken from B. Hovius, *Family Law: Cases, Notes and Materials*, 2d ed. (Toronto: Carswell, 1987).

(ii) Inadequate Provision of Child Support

Section 11(1)(b) of the *Divorce Act* requires that a court, before making an order for divorce, be satisfied that "reasonable arrangements" have been made for the support of the children of the marriage. This section places a positive duty upon a court and requires the court to stay the granting of a divorce until such arrangements are made. In *F.(R.D.) v. F.(S.L.)* (1987), 6 R.F.L. (3d) 413 (B.C.S.C.), the court held that the reasonableness of the arrangements for the support of children cannot be determined according to an "objective" standard, but rather, must be determined according to the particular circumstances of each case:

> A literal construction of this section ... would result in the remedy of divorce being denied to many spouses who otherwise qualify for the dissolution of their marriage. Divorce would be available only to the rich, and seldom, if ever, to the poor. As such would be patently unfair, it cannot have been the intention of Parliament.

In several divorce application cases, the courts have taken seriously their responsibility to be satisfied as to reasonable arrangements for child support. In *MacKinnon v. MacKinnon* (1986), 78 N.S.R. (2d) 361, and *Bergman v. Bergman* (1987), 8 R.F.L. (3d) 94, the Nova Scotia Supreme Court ruled that affidavit evidence on an application for divorce must include evidence of reasonable support arrangements for the children. Without at least a statement of the nature of the parties' employment and income, no divorce judgment could be granted. In *Schultz v. Schultz* (1987), 8 R.F.L. (3d), the Manitoba Queen's Bench stayed a divorce pending financial information *beyond* the wife's statement that she was self-sufficient and required no additional support on top of the $200 per month proposed.

1997 amendments to the *Divorce Act*, which introduced child support guidelines for the calculation of child support, also modified s. 11(1)(b) by directing courts to have regard to the recently enacted child support guidelines in determining the reasonableness of child support arrangements.

In *Harper v. Harper* (1999), 78 D.L.R. (4th) 548, a case decided after the enactment of the child support guidelines, the Ontario Court, General Division stayed an application for divorce on the ground that reasonable arrangements for the support of the children had not been made. There were two children aged eight and four. The custodial mother was receiving public assistance. The father had a gross income of $42,000. He had agreed to pay monthly child support of $350 per child for a total of $700. The Court held that in a divorce by affidavit involving children, there must be disclosure of all material facts in order that the court may discharge its responsibilities under s. 11(1)(b). Following *F. v. F.*, the Court held that in determining the reasonableness of child support arrangements all of the circumstances of each case must be considered. In cases where the custodial parent is receiving social assistance and the non-custodial parent has reasonable income, the court should consider whether the payment agreed to constitutes an objective minimum level of contribution toward the support of the child or children. In situation where the custodial parent is satisfied with an amount less than the court considers reasonable, the court should maintain a flexible approach and consider each case on its merits.

On the facts, the Court held that reasonable arrangements had not been made for the support of the children. The father's proposed contribution fell $400 short of meeting the basic needs of the children, of approximately $1,100 per month. Prima facie, this was unreasonable, particularly in light of his means and ability to pay. Although the children would not receive the benefit of any extra support paid by the father at the time, given that any support received by the mother would be deducted from her public assistance entitlement, setting support at a realistic level from the outset would enure to the benefit of the children when the social assistance ended.